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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. [redacted] 481

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Appeal from the Decision of the Alcoholic Beverage Control Appeals Board of the State of California, of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 32948, and of the California Supreme Court

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRIOR PROCEEDINGS

This is an appeal by a retail liquor licensee

from an order of the Department of Alcoholic Beverage Control of the State of California revoking the Appellant's liquor license. The Alcoholic Beverage Control Appeals Board of the State of California sustained said order in an unreported decision, appended hereto as Appendix "A". The appellant petitioned the Court of Appeals of the State of California, Second Appellate District for a Writ of Review to review the Appeals Board's Order. Said petition was rejected, without opinion, by the Court of Appeals. A petition for Hearing and/or Writ of Review was made to the California Supreme Court which denied the petition without opinion on May 22, 1968. The orders of denial are filed concurrently herewith as part of the certified record.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The proceedings in the State Court arise out of administrative proceedings before the Department of Alcoholic Beverage Control of the State of California for violations of §24755 Business and Professions Code of the State of California, the California Mandatory Retail price fixing law. The Department ordered the licensee revoked for sales of liquor below mandatory retail prices which had been filed by liquor distillers with the State of California.

Appellant duly appealed to the Alcoholic Beverage Control Appeals Board, a State body

set up by the California Constitution to review decisions of the Department. Said Appeals Board affirmed the decision of the Department on State grounds, although the Federal grounds had also been raised. Such affirmation was filed on March 13, 1968.

Section 23090, et seq. of the Business and Professions Code of the State of California allows review of the Department and Appeals Board's decisions only by Petition for Writ of Review, akin to certiorari. Such a petition was made to the Court of Appeals, Second Appellate District. Said Court denied the Petition for Writ of Review on April 24, 1968.

Petition for Hearing was made to the California Supreme Court and a hearing was denied on May 22, 1968.

Notice of Appeal was filed in the Court of Appeals of the State of California, Second Appellate District on June 5, 1968, said Court being the highest state court in which a decision could be had.

This is an appeal pursuant to 28 U.S.C.A. 1257(2). Among the cases believed to sustain jurisdiction are Seagram & Sons v. Hostetter, 384 U.S. 35 and Standard Oil Company of California v. Johnson, 316 U.S. 481.

The California Statutes and laws which appellant claims to be in violation of the United States Constitution and the Federal Anti-Trust laws are California Business and Professions

Code, §24755, a copy of which is appended hereto as Appendix "B" and Title 4, California Administrative Code, Rule 99, appended hereto as Appendix "C".

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether or not the California Liquor Price Fixing Laws (§24755 of the Business and Professions Code) are invalid as being in violation of the Anti-Trust Laws of the United States (15 U. S. C. A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

2. Whether or not §24755 Business and Professions Code and Title 4, Rule 99, California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because:

(a) The statute sets up privileges for liquor manufacturers and wholesalers whereby the State of California at public expenses enforces the fixed price. Such enforcement is not provided for any other industry.

(b) Two different trading areas are set up within the State. No valid reason or legitimate purpose exists for either of the foregoing discriminatory practices.

(c) A state function is delegated to private industry without adequate, or indeed, any safeguards.

(d) Economically disadvantaged persons are required to purchase inferior goods and are prevented from taking advantage of quantity discounts. The statute, if effective, only enforces prohibition for the poor and not the wealthy.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Appellant holds a license to sell alcoholic beverages. This license was revoked after an administrative hearing by the Department of Alcoholic Beverage Control for sales of alcoholic beverages below a minimum price filed by the wholesalers and manufacturers of the alcoholic beverages in violation of §24755 Business and Professions Code.

The federal questions were raised at all stages of the proceedings. Initially, in the notice of defense filed at the administrative level. The notice of defense is appended hereto as Appendix "D". The federal questions are

raised on pages D-5 to D-9, inclusive.

In the Notice of Appeal before the Appeals Board appended hereto as Appendix "E" the federal questions were raised at page E-2. The issues were overruled by the Appeals Board on page A-10 of its opinion (Appendix "A").

The federal issues are also set forth in the Petition for Writ of Review filed with the Court of Appeals at pages 19 to 23, inclusive and in the Petition for Hearing in the California Supreme Court. Said petitions are filed concurrently herewith as part of the certified record in this case.

In essence, the attitude of the California Courts has been that the constitutional issues have been settled in California by virtue of the cases of Wilke and Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 385 and Reimel v. Alcoholic Beverage Control Appeals Board, 256 A. C. A. 188 (now before this Court as Cohen v. Kirby, Oct. Term 1967).

By virtue of §24755 Business and Professions Code, a manufacturer of alcoholic beverages need only file a minimum price schedule for such beverages with the State of California and publish it in a trade journal. Thereafter, the State of California, at no expense whatsoever to the manufacturer enforces his minimum price by gathering evidence and prosecuting the violators. There is no state control of the price to be set. Only the manufacturer sets the price.

The rules of the Department allow a 10% discount on the minimum price for case purchases. There is also a substantial number of sales in California of non-brand name alcoholic beverages for which no minimum price is filed. These non-branded liquors are substantially cheaper than the branded items and are usually inferior in quality.

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE PROPOSED APPEAL

Petitioner alleges that §24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and further alleges that it is in conflict with the Sherman Anti-Trust Act (15 U.S.C.A., §§ 1, 2 and 45).

This State statute has been before the California Supreme Court twice in the last eight years, Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737, and Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735.

The statute in question is California's mandatory price fixing statute for alcoholic beverages. Under the statute, manufacturers merely

file and publish the price at which their brands are to be sold. No state agency controls the price and the manufacturer is free to set any price he chooses for his product. Thereafter, the Department of Alcoholic Beverage Control enforces the price at no cost to the manufacturer and licensees are subject to suspension and/or revocation of their license for sales below the filed price.

The statute was first held to be constitutional in the Allied Properties case, supra, in 1959, by a four to three decision. In 1966, the California Supreme Court again consented to hear a case deciding the constitutionality of the statute, and in the Wilke and Holzheiser case, supra by a five to two decision, again held the statute to be constitutional.

It should be emphasized that §24755 is not a civil fair trade statute providing a civil remedy to persons aggrieved by sales below a fair trade price. It is a State administered statute providing for action by the State to enforce the manufacturer's prices through the offices of the Department of Alcoholic Beverage Control.

The Allied Properties case, supra, was not appealed to this Court. In the Wilke and Holzheiser case, supra, an application was made to a three Judge District Court which held that plaintiff's remedy was solely by way of appeal or petition for certiorari to the United States Supreme Court, 266 F. Supp. 168.

These are the first cases involving a ruling

on the constitutionality of the liquor price fixing statute of California where application has been made to this Court.

There is a sharp division of authority among the highest courts of other states as to the constitutionality of liquor price fixing statutes similar to California's statute.

The Louisiana Supreme Court in holding a mandatory liquor price fixing statute, that was similar to California's unconstitutional, stated that the statute:

> " . . . bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignoble flight from competition."
>
> Reynolds v. Louisiana, Board of Alcoholic Beverage Control, 185 So. 2d 794, 812 (La. 1966) (Petition for Certiorari to U. S. Supreme Court denied, U. S. Law Week 3173, November 14, 1966).

The Supreme Court of New Mexico held in Drink, Inc. v. Babcock, 421 P. 2d 798, that the New Mexico statute,

> " . . . [was] not an appropriate exercise of the States' police power . . . . "
>
> 421 P. 2d at 803.

Perhaps the most succinct analysis of the true purpose of these liquor fair trade laws is contained in the decision of the Florida Supreme Court, holding such a law unconstitutional, wherein the court stated:

> "The act, upon its face, is one not designed to effect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his customers may be forced to sell liquor at a substantial profit. . . ."

Scarborough v. Webbs Cutrate Drug Company, 150 Fla. 754, 8 So. 2d 913, 922 (1942).

Similar liquor price fixing statutes have been held unconstitutional in Oklahoma in Oliver v. Oklahoma Alcoholic Beverage Control Board, 359 P. 2d 183 (1966); in Kansas in State v. Mermes, 358 P. 2d 936 (1961); in Illinois in Lombardo Wine Co. v. Taylor, 95 N. E. 2d 60; and in Nebraska in Terry Carpenter v. Nebraska Liquor Control Commission, 120 N. W. 2d 374.

In the Allied Properties case, supra, the dissenting judge in the California Court of Appeals pointed out in connection with the statute that:

> ". . . the very person or corporation that manufactures or distributes the product sets the price at which the

retailer may and must sell, without any right of any kind or character on the part of any representative of the State, to challenge it for price, quality or otherwise. This, to me, is uncontrolled monopoly run riot with State sanction."

339 P. 2d at 1024.

Mr. Justice Peters of the California Supreme Court, who dissented in the Allied Properties case, supra, also stated in his dissent in the Wilke and Holzheiser case that:

". . . the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprises a mandatory price fixing system whereby the producers or wholesalers of branded or trade-marked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the State of Civil and Criminal sanctions upon non-complying retailers."

55 Cal. Rptr. at 44.

He then concluded that:

"It is apparent from an analysis of the liquor fair trade law, however,

that it bears no relation at all to the purported objective of promoting temperance. While the stated purpose of the law is to restrict the sale and consumption of alcoholic beverages the use of fair trade contracts as a means necessarily guarantees that that objective will not be achieved." (Emphasis added.)

55 Cal. Rptr. at 47.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it is enforced by the State of California for the benefit of liquor manufacturers and against liquor retailers while no other manufacturers of any other goods have this privilege and no other retailer of goods are subject to this discipline and enforcement, and, because, with no basis for the distinction, two different trading areas are set up within the State and the manufacturer can file one price for Northern California and another price for Southern California. The taxpayers of California thus support a non-governmental special segment of the economy.

Furthermore, the effect of mandatory price fixing is to make drinking of branded liquors economically impossible only for low income groups who are required to purchase non-branded alcoholic beverages which are sold at substantially reduced prices. California statutes also allow a ten per cent (10%) discount on brand

items for case purchases. Thus, the wealthy not only are the only ones who can afford the branded fair traded items, but if they have sufficient purchasing power, they may avail themselves of a ten per cent (10%) discount not available to low income groups unable to purchase case lots. In effect, the system requires the poor to purchase alcoholic beverages of inferior quality and denies them the discount available.

Finally, the statute, if the purpose is to promote temperance by fixing high prices, in effect, fosters prohibition only for the economically disadvantaged and not for the poor in violation of the Equal Protection Clause of the Fourteenth Amendment.

Section 24755 of the California Business and Professions Code which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face presently violates Federal anti-trust laws. Prior to 1961, the statute provided that branded alcoholic beverages in fair and open competition could be fair traded in California upon a price established by a contract or agreement. This was in line with the express provisions of the exemptions provided by the Miller-Tydings (15 U. S. C. A. §1) and McGuire (15 U. S. C. A. §45) acts.

The amendment in 1961 of Section 24755 (in response to a finding by a Superior Court that a revocation was improper because there had been no finding that the items were in fair and open competition as required by the statute and the exemption amendments to the Sherman

Act §1) eliminated the necessity of a contract or agreement and eliminated the requirement that the commodity be in fair and open competition.

The elimination of these requirements is clearly not in accord with the anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal per se under the Federal anti-trust laws unless the Federal exemption statutes apply. (See: United States v. McKesson & Robbins, 351 U.S. 305, 309-311 [1953] and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-388 [1950]. It can be noted that the latter case concerned contracts for price fixing of liquor and it was still struck down by the United States Supreme Court.)

Since the California statute does not provide for either "fair and open competition" or for contracts, it is not immunized from Federal anti-trust laws. Eastman Kodak v. Federal Trade Commission (2nd Cir.), 330 U.S. 828, clearly hold that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

Evidence of "lack of fair and open competition" has not been permitted before California administrative agencies or courts. See: DeMartini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787 and Dave's Market v. Department of Alcoholic Beverage Control, 222 Cal. App. 2d 671.

The California Attorney General, representing the Department of Alcoholic Beverage Control, has argued in the Wilke and Holzheiser and Allied Properties cases, supra, that the Twenty-first Amendment to the United States Constitution prevents any challenge of the California statute. It has since been established by the United States Supreme Court, however, that no such rule exists, e.g., in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 12 L.Ed. 2d 350, 84 S. Ct. 1293, where the court states at 12 L. Ed. 2d, at page 356, that:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd over simplification."

The Supreme Court in 1966 held, in Joseph E. Seagram, Inc. v. Hostetter, 86 S. Ct. 1254, that the Twenty-first Amendment must be read in light of the other amendments of the Constitution, and although the court upheld the New York law being questioned there, it clearly established the principle that the State law had to be a reasonable law and not deny the requirements of Equal Protection of the laws as provided by the Fourteenth Amendment.

The facts found by the "Moreland Commission on the Alcoholic Beverage Control law" appointed by Governor Rockefeller regarding the background and ineffectiveness of mandatory

price fixing laws also demonstrate the evils of such laws. It was The Moreland report which caused New York to change its mandatory price fixing statute (which previously was like California's statute) and to pass the present New York statute held constitutional in Seagram & Sons v. Hostetter, 384 U.S. 35, 16 L. Ed.2d 336, 86 S. Ct. 1254. The Moreland Commission found, at page 1 of the report, that,

> "The mandatory price control should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

The statute further constitutes special legislation by the State of California for the benefit of manufacturers and wholesalers of alcoholic beverages.

The statute bears no reasonable relationship to the exercise of the police power of the State or the alleged object sought to be obtained, i.e., the promotion of temperance, indeed, the statute is designed to achieve the opposite effect.

The statute by granting state enforced price fixing powers to private persons also "is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process" (dissenting opinion, Wilke and Holzmeiser, supra, 55 Cal. Rptr. at p. 49).

The Supreme Court is the only court

available now to rule on the constitutionality of the California statute. In Dave's Market v. Department of Alcoholic Beverage Control, (U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103), a three judge District Court was convened but sent the matter back for determination on State issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the State issues and therefore appeal to the Supreme Court was the only remedy. This was also essentially the decision in the District Court case of Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 266 F. Supp. 168.

CONCLUSION

Legalized price fixing and monopoly should be subject to careful scrutiny by the courts to insure strict compliance with the federal exceptions. When a statute allows a manufacturer to set an arbitrary price at which his commodity must be sold throughout the state and then when the state enforces this price at no expense to the manufacturer the consumer is harmed. Not only is the consumer forced to pay the higher price he is also required, by way of taxes for the state enforcement, to pay the cost of enforcing the higher prices.

Such a state sanctioned monopoly and gratuity to liquor manufacturers should not be tolerated. A full briefing of the matter should

be allowed by this Court for the protection of the consumers of the State of California and other consumers in states having similar laws.

Respectfully submitted,

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